MOTION FILED

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No. 01-1539

In the

Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF SHEMCO, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b), Shemco, Inc. respectfully seeks leave to file the attached brief amicus curiae in support of petitioner Peter Sudarsky. Counsel for respondent City of New York effectively withheld their consent by declining to return the undersigned's telephone calls.

As described more fully in the attached brief, Shemco is a commercial lighting equipment supplier based in New Haven, Connecticut; it supplies, along with commercial users, primarily real property developers. Shemco was prepared to supply petitioner with equipment for the aborted project that gave rise to this litigation. Shemco also believes that faulty applications of ripeness doctrine should not be permitted to insulate from review government actions that work regulatory takings.

Because petitioner has appeared pro se and respondents have waived the right to file briefs in opposition, the attached amicus brief brings to the attention of the Court relevant matter not already brought to its attention by the parties.

For these reasons, Shemco, Inc. respectfully requests the Court to grant leave to file the attached brief amicus curiae.

DATED: May, 2002.

Respectfully submitted,

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QUESTION PRESENTED

Whether a property owner is, regardless of the relevant facts and circumstances, categorically precluded on ripeness grounds from ever asserting a regulatory takings claim solely because he never "requested a variance" or "submitted a [new] proposal" for development.

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INTEREST OF AMICUS CURIAE

Amicus curiae Shemco, Inc. is a supplier of commercial lighting equipment based in New Haven, Connecticut. Along with commercial users, Shemco supplies primarily developers of real property. Shemco has a particular interest in this case, in that it was prepared to supply petitioner with equipment for the aborted project that gave rise to this multi-year regulatory takings litigation. Shemco also has a more general interest in this case: when government officials restrict the use and development of property in such a manner as to work a taking of private property for public use, and when the courts refuse to hear claims for such regulatory takings under faulty applications of doctrines like ripeness, all citizens suffer.[1]

SUMMARY OF ARGUMENT

Petitioner Peter Sudarsky has been attempting for a dozen years to convince some court, state or federal, to hear and decide the merits of his regulatory takings claim against the City of New York. In the latest rebuff, the Second Circuit held that his claim was not ripe under the categorical rule that a takings claim can never be ripe if a property owner does not *request a variance* or *submit a new proposal* after his first development proposal is rejected. This categorical rule brings the decision below into conflict with the many federal and state decisions that have excused property owners from these actions if they would be *idle or futile*, which is precisely what Mr. Sudarsky alleges. The Second Circuit's categorical rule also conflicts with the recent takings decisions of this Court, which eschew per se rules in favor of examining all relevant circumstances.

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

ARGUMENT

THE CATEGORICAL RIPENESS REQUIREMENTS IMPOSED BY THE SECOND CIRCUIT ARE IN CONFLICT WITH THE DECISIONS OF OTHER LOWER COURTS AND OF THIS COURT

A. The Lower Court's Ruling

Like many property owners in recent years, Mr. Sudarsky comes to this Court seeking to overturn a lower court's ruling that his regulatory takings claim is not ripe for decision. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). In the present case, the Second Circuit went one better than the courts that were reversed in *Palazzolo* and *Suitum*: it ruled not merely that Mr. Sudarsky's regulatory takings claim was not ripe; it ruled that "[h]is claim *never* will be 'ripe.' " Petition Appendix (Pet. App.) 5a (emphasis added). Why such a definitive—indeed, final—holding?

The Second Circuit's answer was simple: "because [Mr. Sudarsky] sold his property before obtaining the required determination" of the subject property's permitted uses. *Id.* In theory, this statement could mean one of two things. First, that a person cannot succeed on a regulatory takings claim unless he owns the property at the time the reviewing court rules on his claim. That is a self-evidently wrong proposition, and it is contradicted by, among other decisions, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996) (rejecting argument that "because Del Monte sold the Dunes to the State of California for $ 800,000 more than it paid, economically viable uses for the property must have existed," and upholding takings award of $1.45 million), *aff'd*, 526 U.S. 687 (1999). *Cf.* Brief for the Petitioner at 3, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (No. 97-1235) (stating that "Del Monte Dunes had sold the property for $ 4.5 million ($ 800,000 more than its purchase price) while the case was pending"), 1997 U.S. Briefs LEXIS 1235 (June 4, 1998).

Second, and much more likely, the Second Circuit meant to give significance to the fact that, having sold the property, Mr. Sudarsky could no longer invoke those talismans of ripeness jurisprudence, the "variance" and the "second proposal." That is, because he "never requested a variance from the new zoning requirements or submitted a proposal other than his 17-story apartment building," and because he "never will be able to do so" in the future, his takings claim could not be ripe.

Did the Second Circuit's demand that Mr. Sudarsky request a variance or submit a second development proposal as a condition of asserting a takings claim depend on the specific facts of his case? Absolutely not: given his failure to do one or both of these things, Mr. Sudarsky "can under *no set of facts* satisfy" ripeness requirements. Pet. App. 4a (emphasis added) (citing *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986)). In other words, according to the Second Circuit, it is a categorical prerequisite to advancing a regulatory takings claim that a property owner whose first development proposal is rejected either *request a variance* or *submit a new proposal*. As explained below, this categorical proposition of ripeness law cannot be reconciled with the decisions of other lower courts or with the decisions of this Court.[2]

B. The Conflict with Other Lower Courts

Many lower courts have rejected the notion that requesting a variance or submitting multiple development proposals is a categorical prerequisite to ripening a takings claim. Usually this rejection goes under the name of the "futility exception" to the final decision requirement.

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[2] At the beginning of its opinion, the Second Circuit noted that the district court had dismissed Mr. Sudarsky's complaint "principally on grounds of *res judicata*." Pet. App. 3a. As described in the text, however, the Second Circuit's ruling obviously did not rest on those grounds. Accordingly, res judicata does not, and in fact should not, bar the Court's consideration of the question presented.

The Ninth Circuit, for example, has opined that the exception serves "to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 504 (1990), *cert. denied*, 502 U.S. 943 (1991). Moreover, a "variance" or similar procedural devices need be sought only when they "are available and *could* provide [some] relief." *Id.* at 503 (emphasis added). In general, "the final decision requirement can be avoided if attempts to comply with that requirement would be futile." *Hoehne v. County of San Benito*, 870 F.2d 529, 534 (9th Cir. 1989). As the court of appeals put the point in an earlier iteration of the *Del Monte Dunes* litigation:

> This circuit recognizes a limited futility exception to the requirement that a landowner obtain a final decision regarding the application of land use regulations to the affected property. Under this exception, the resubmission of a development plan or the application for a variance from prohibitive regulations may be excused if those actions would be idle or futile.

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1501 (9th Cir. 1990).

The California courts have adopted this same analysis as their own. As the state court of appeal observed in *Calprop Corp. v. City of San Diego*, 91 Cal. Rptr. 2d 792, 800 (2000), "[t]he futility exception as articulated in California cases has largely followed the pattern described by the Ninth Circuit in *Del Monte I*." *See also id.* at 799 (quoting with approval the block-quoted passage above); *Toigo v. Town of Ross*, 82 Cal. Rptr. 2d 649, 660 (1998) ("Under [the futility] exception, the submission of another development plan is excused if such an application would be an 'idle and futile act.'").

Other federal courts of appeals are in accord with the decisions of the Ninth Circuit and in conflict with the decision below. The Federal Circuit, which handles most of the takings claims asserted against the United States, has opined that "the futility exception may sometimes excuse a property owner from submitting 'multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.' " *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001) (quoting *Howard W. Heck & Associates v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998)). The Sixth Circuit has held that the exception, "stated in the context of allegations of 'takings' of property without just compensation as proscribed by the Fifth Amendment, applies where to seek a variance from a zoning regulation would be an 'idle and futile act.' " *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1363 (6th Cir. 1992); *accord, e.g., Seguin v. Sterling Heights*, 968 F.2d 584, 588 (6th Cir. 1992) (opining that "if a plaintiff can demonstrate futility, he or she will be excused from complying with the variance requirement"). Other appellate courts are in accord.[3]

The ruling of the court below cannot be reconciled with these decisions. As noted by the Second Circuit, "[d]uring the planning process, city officials informed [Mr.] Sudarsky that they required a transit easement on his property for an underground pedestrian tunnel." Pet. App. 3a. If, as Mr. Sudarsky

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[3] *See Eide v. Sarasota County*, 908 F.2d 716, 726 (11th Cir. 1990) ("The so-called 'futility exception' to the final decision requirement for due process takings and just compensation claims does excuse the repeated submission of development plans where the submission would be futile."), *cert. denied*, 498 U.S. 1120 (1991); *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir.) (agreeing with the Ninth Circuit that "the final decision requirement may be met with proof that attempts to comply would be futile"), *cert. denied*, 488 U.S. 891 (1988); *Sammon v. New Jersey Board of Medical Examiners*, 66 F.3d 639, 643 (3d Cir. 1995) (opining that "[l]itigants are not required to make such futile gestures to establish ripeness").

alleges, these same officials imposed a "permit ban" until the required easement was furnished, and if, as he further alleges, the easement could not possibly be furnished because the "City had not designed [the] tunnel and had failed to determine the dimensions of an easement which it was willing to accept," *id.*, then this is a classic case of futility. Is it not "idle and futile" to submit a second application for a building permit when the first was rejected not because the project was too big but rather because the applicant had not yet provided an easement that in fact was impossible to provide? Is it not "idle and futile" to request a variance from a transit easement requirement when the decision makers had *already* reconsidered their decision? *See Sudarsky v. City of New York*, 779 F. Supp. 287, 292 (S.D.N.Y. 1991) ("This letter was superseded by a second letter from the [New York City Transit Authority], dated February 13, 1987, which stated: 'upon reconsideration, the Transit Authority has determined that a transit easement is required [on Sudarsky's proposed development].'"), *aff'd mem.*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993).[4]

C. The Conflict with this Court

Although the Second Circuit purported to base its categorical ripeness ruling on this Court's decision in *MacDonald*, that case does not support the court below. In explicating the requirement that a property owner obtain a final and authoritative determination of legally permitted uses, *MacDonald* was careful to state that a "property owner is of course not required

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[4] The Ninth Circuit's decision in *Hoehne* provides an explicit contrast with the decision below in this regard. *See* 870 F.2d at 535 ("It would have also been futile for the Hoehnes to seek a conditional use permit or a more favorable rezoning because in actually rezoning the tract to further restrict development, the supervisors themselves sent a clear and, we believe, final signal announcing their views as to the acceptable use of the property."). Here, Transit Authority officials sent a similarly "clear" signal when they decided, upon reconsideration, to impose the easement requirement on Mr. Sudarsky.

to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." 477 U.S. at 350 n.7. As described above, the Catch-22 in which Mr. Sudarsky landed —required to provide a transit easement to officials who had not determined what dimension of easement they would accept —surely must be an example of the kind of unfair procedures *MacDonald* meant to condemn.

More fundamentally, the Court's most recent takings decisions condemn the kind arid formalism the Second Circuit's categorical must-request-variance-or-submit-new-proposal rule would impose on takings law. In the *Palazzolo* litigation, the state court found the property owner's regulatory takings claim unripe based on the "self-evident conclusion"—a conclusion remarkably similar to the Second Circuit's—that "a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained." *Palazzolo v. State*, 746 A.2d 707, 714 n.6 (R.I. 2000). This Court categorically rejected that categorical formulation: "Ripeness doctrine does not require a landowner to submit applications for their own sake." 533 U.S. at 622. The relevant inquiry is not whether the property owner has complied with some formalistic requirement; instead, it is whether there is, under the particular facts and the governing state and local law, "uncertainty as to the land's permitted use." *Id.* By contrast, if an examination of the facts and law "makes clear the extent of development permitted," that is sufficient. *Id.* at 625-26.

The Court's decision just last month in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, 2002 U.S. LEXIS 3028 (Apr. 23, 2002), confirms these points. Though *Tahoe-Sierra* was not strictly a ripeness case, its general analytical framework has great bearing here. If the Court was correct to "resist the temptation to adopt per se rules in our cases involving partial regulatory takings," *id.* at

*43-44, it surely would not countenance per se rules like that established by the court below. If the answer to questions of substantive takings law "depends upon the particular circumstances of the case," *id.* at *35, then so also ought the answer to questions of ripeness. If the Court's regulatory takings jurisprudence truly "is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances," *id.* at *36 (internal quotation marks omitted), the aspect of regulatory takings jurisprudence that is the ripeness doctrine should share in such characterization. The Second Circuit's categorical rule surely does not.

Given the lower court's conflict with a decision handed down by this Court only last month, the Court should at least consider granting Mr. Sudarsky's petition, vacating the decision below, and remanding the case for reconsideration in light of *Tahoe-Sierra*. After more than a dozen years of litigation in which no court has ever addressed the merits of his regulatory takings claims, Mr. Sudarsky deserves no less.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: May, 2002.

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